No. 92-166

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION TO ITS PETITION

JOHN H. KAZANJIAN
Counsel of Record
IRENE C. WARSHAUER
MARY BETH GORRIE
Counsel for Petitioner
Keene Corporation
ANDERSON KILL OLICK & OSHINSKY, P.C.
666 Third Avenue
New York, New York 10017
(212) 850-0700

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Petitioner Keene Corporation ("Keene")[1] submits this Reply Brief in further support of its Petition for a Writ of Certiorari. Keene seeks review of a decision by the United States Court of Appeals for the Federal Circuit, *UNR Industries, Inc. v. United States*, 962 F.2d 1013 (Fed. Cir. 1992) ("*UNR*") (Pet. App. at A-1)[2], which dismissed Keene's actions against the Government in the United States Claims Court for indemnity and contribution in connection with thousands of asbestos personal injury cases.

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[1] Pursuant to Rule 29.1 of the Rules of this Court, Keene states that it has no parent companies or nonwholly-owned subsidiaries that are required to be named herein. Pursuant to Rule 14.1(b), UNR Industries, Inc., UNARCO Industries, Inc. and Eagle-Picher Industries, Inc. were parties in the proceeding before the Federal Circuit along with Petitioner Keene and the Respondent United States. GAF Corporation was *amicus curiae* in that proceeding.

[2] "Pet. App. at ____" refers to the Appendix submitted by Keene with its Petition for Writ of Certiorari.

ARGUMENT

I.

THE GOVERNMENT CANNOT JUSTIFY *UNR*'S NULLIFICATION OF FOUR DECADES OF SETTLED LAW.

The Government's Brief in Opposition to Keene's Petition for Certiorari fails to rebut Keene's argument that the *UNR* decision erroneously swept aside approximately four decades of settled precedent construing 28 U.S.C. §1500 (1988) ("§1500"). The Government merely intones that the Federal Circuit has spoken, but it ignores the practical problems which the decision creates, and fails to address *UNR*'s effect on litigants with legitimate claims against the Government who have relied upon the precedent overturned.

The Government is mute as to the fact that Congress, by declining to enact contrary legislation over the years, has ratified the settled law which was overturned by *UNR*: *Tecon Engineers, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 976 (1966) ("*Tecon*"); *Boston Five Cents Savings Bank v. United States*, 864 F.2d 137 (Fed. Cir. 1988) ("*Boston Five Cents*"); *Brown v. United States*, 358 F.2d 1002 (Ct. Cl. 1966) ("*Brown*"); *Hossein v. United States*, 218 Ct. Cl. 727 (1978) ("*Hossein*"); and *Casman v. United States*, 135 Ct. Cl. 647 (1956) ("*Casman*"). Indeed, Congress has never offered any signal that it questioned the interpretations of §1500 contained in that chain of decisional law. The Federal Circuit erred in overruling established precedent that had enjoyed Congressional approval.

Congressional renactment of a statute absorbs the decisional law which has interpreted it. *Pierce v. Underwood*, 487 U.S. 552, 567 (1988). When Congress enacted the Federal Courts Improvement Act in 1982, the only amendment it made to §1500 was the substitution of "United States Claims Court" to replace the former title "Court of Claims." Federal Courts Improvement

Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified as amended in scattered sections of the United States Code) (1982). In fact, the very purpose of the Improvement Act was resolution of procedural complexities in Claims Court actions. S. Rep. No. 97-275, 97th Cong., 2d. Sess. 1 (1982). Congress's decision to make only a cosmetic adjustment to the statute is the plainest evidence that it agreed with the rules interpreting §1500 borne in *Tecon*, *Boston Five Cents*, *Brown*, *Hossein* and *Casman*. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) teaches that the "legislative power is implicated" when Congressional silence follows the judicial interpretation of a statute.[3] *Stare decisis* commands obeisance to the settled construction of a statute which Congress has declined to modify.

When Keene voluntarily dismissed its third-party action in *Miller v. Johns-Manville Products Corp.*, No. 78-1283E (W.D. Pa. 1979) (Pet. App. at I-1) ("*Miller*") and brought its Claims Court action in 1979, *Keene Corp. v. United States*, No. 579-79C (Ct. Cl. 1979) (Pet. App. at H-1) ("*Keene I*"), *Tecon* had been settled law for over a decade and *Casman* for over two decades. Because Keene voluntarily dismissed *Miller*, the only action it had pending against the Government in 1979 was *Keene I*. Keene's subsequent federal district court actions against the Government based on tort and seeking other remedies not available in the Claims Court, were permissible under *Tecon* and *Casman*. A law review article relied upon by the Government recognizes that "two suits are sometimes necessary in the complex world of remedies against the United States and its officers." Schwartz, *Section 1500 of the Judicial Code and*

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[3] The significance of Congressional silence was a determining factor in *Flood v. Kuhn*, 407 U.S. 258, 282-84 (1972) (admitting that the Court's grant of antitrust immunity to professional baseball is an "aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis*"). *See also Southwest Marine of San Francisco v. United States*, 896 F.2d 532, 534 (Fed. Cir. 1990) (refusing to find that the Federal Courts Improvement Act created an exception to district courts' exclusive jurisdiction over government maritime contracts without evidence of "clear congressional intent").

Duplicate Suits Against the Government and its Agents, 55 Geo. L.J. 573, 599 (1967), *cited in* Brief for the United States in Opposition, *Keene Corp. v. United States*, *petition for cert. filed*, (No. 92-166, July 22, 1992) at 9-10 ("Gov't Br.").[4]

If the Federal Circuit now disagrees with the very rules it has promulgated over the past forty years, it cannot modify §1500 freehandedly; the court must look to Congress for an authoritative revision of that law. The Government's Brief is silent on the limits of a court's authority to overrule Congress under these circumstances. It is noteworthy that the Schwartz article advocates legislative reform of §1500 or, alternatively, use of equitable estoppel or the doctrine of *res judicata* to achieve equitable results. *Id.* at 584, 589-99. Thus legislative action, not the sweeping judicial reform of the Federal Circuit's opinion in *UNR*, is the appropriate means of simplifying issues under §1500.

[4] The Government's citations to *Corona Coal Co. v. United States*, 263 U.S. 537 (1924), Gov't Br. at 8-12, are inapposite: that decision ruled on an issue completely distinguishable from Keene's position. *Corona Coal* involved a Claims Court litigant who filed an action in federal district court *after* the Claims Court had rendered judgment against it.

Similarly, the Government's reliance on *Matson Navigation Co. v. United States*, 284 U.S. 352 (1932), Gov't. Br. at 9, is misplaced because that decision specifically acknowledged that parallel actions in the Court of Claims and in federal district court might be necessary for full satisfaction of claims which cannot be combined in a single forum. Indeed, the *Matson* Court pointed out that §1500's predecessor could only "require an election between a suit in the Court of Claims and one brought in another court against an agent of the Government, in which the judgment would not be res adjudicata in the suit pending in the Court of Claims . . . ." *Id.* at 356.

The Government's misleading quote on the "plain meaning" rule as discussed in *Corona Coal*, Gov't. Br. at 12, invites reflection on Justice Holmes' earlier caveat that a court must never assume that "the jurisdiction of the Court of Claims is to be construed strictly and read with an adverse eye." *United States v. Emery*, 237 U.S. 28, 32 (1915).

II.

THE GOVERNMENT MISCHARACTERIZES KEENE'S ACTIONS AGAINST THE UNITED STATES.

The Government's rendering of the facts distorts the chronology of Keene's litigation against the Government: it suggests that Keene attempted to abuse the judicial process by playing a litigation "shell game" in various federal courts. For example, the Government's Brief implies that Keene's FTCA action preceded the filing of its Claims Court action, which is simply false.

The Government's Brief masks several important facts. Keene's voluntary dismissal of its third-party complaint against the Government in *Miller* a few months after it was brought reduced that action to a nullity; the *Miller* complaint dissolved as if it had never existed, and the Claims Court should not have based its dismissal of Keene's action on *Miller*.[5] Also, Keene's FTCA actions against the Government did not fall within the prohibition of §1500 because they sought remedies which the Claims Court cannot provide. Keene's Claims Court actions were based on claims arising out of Keene's contracts with the Government, which a federal district court could not entertain, and the Claims Court could not exercise jurisdiction over the causes alleged in Keene's FTCA actions which were based on tort theories. *Keene Corp. v. United States*, 700 F.2d 836 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983).

For nearly forty years, Claims Court judges have held that §1500 will not apply when a claimant's actions cannot be

[5] *See, e.g., A.B. Dick Co. v. Marr*, 197 F.2d 498, 502 (2d Cir.), *cert. denied*, 344 U.S. 878, *reh'g denied*, 344 U.S. 905 (1952); *Navajo Tribe of Indians v. United States*, 601 F.2d 536, 540 (Ct. Cl. 1979), *cert. denied*, 444 U.S. 1072 (1980). *See also* C. Wright & A. Miller, *Federal Practice & Procedure: Civil* § 2367 at 184-87 (1971), and at 54-55 (1992 Pocket Part).

Ironically, the Government was unaware that Keene had filed its solitary third-party action in Miller; it was counsel for Keene who discovered that complaint and brought it to the attention of the Claims Court.

consolidated in the same court. *Prillman v. United States*, 220 Ct. Cl. 677 (1979), *Allied Materials & Equipment Co. v. United States*, 210 Ct. Cl. 714 (1976), and *Casman v. United States*, 135 Ct. Cl. 647 (1956). This was the state of the law when Keene approached the Claims Court; nevertheless, *UNR* summarily disregarded Keene's position, declaring that "this relies on the exception *Casman* opened up, and as of today, *Casman* and its progeny are no longer valid." *UNR*, 962 F.2d 1013, 1025 (Fed. Cir. 1992). Pet. App. at A-22.

Moreover, both Keene's FTCA actions were dismissed for lack of subject matter jurisdiction. Significantly, the Second Circuit noted that jurisdiction over Keene's claim laid exclusively within the Claims Court when it affirmed dismissal of Keene's first FTCA action. *Keene Corp. v. United States*, 700 F.2d 836, 845 n.13 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983). The United States District Court for the District of Columbia relied on that decision when it dismissed Keene's second FTCA action. *Keene Corp. v. United States*, 591 F. Supp. 1340 (D.D.C. 1984), *aff'd sub nom., GAF Corp. v. United States*, 818 F.2d 901 (D.C. Cir. 1987). Under the rule of *Connecticut Dep't of Children & Youth Services v. United States*, 16 Cl. Ct. 102 (1989), the Federal Circuit should have heeded the rationale of *Brown* and held that, following such a dismissal, "section 1500 would no longer apply . . . ." *Id.* at 102-03.

Finally, the Claims Court's review of the *Keene I* and *Miller* litigation was not "fact-sensitive" as the Government's Brief suggests; the merits of those cases were never addressed. The Claims Court observed only that "[a]pplication of section 1500 *does not call for examining the record of the district court in this matter.*" *Keene Corp. v. United States*, 17 Cl. Ct. 146, 159 (1989), Pet. App. at E-25 (emphasis added). The allegations and the operative facts in the two actions were different, the damages in *Keene I* were of a far greater magnitude than those sought in *Miller*, and Keene's liability in *Miller* had not even been established when it impleaded the Government.[6]

[6] Furthermore, when the Second Circuit dismissed Keene's FTCA action, it chided Keene for its "fail[ure] to implead the United States into those suits which were brought against it in the federal courts." 700 F.2d at 843 n.10.

Keene has not spent the past decade shuttling in and out of federal courthouses to file vexatious claims, as the Government's Brief suggests. Gov't Br. at 13. On the contrary, Keene has attempted to tailor its claims to the proper forum; its tort and contract actions could not be consolidated in a federal district court nor in the Claims Court. *UNR*'s overruling of *Casman* has cut off Keene's channels for redress.

It is patently unfair to compel a litigant to chose between tort and contract theories at the threshold of litigation, or to force a choice between legal and equitable remedies. The rules articulated in *Tecon*, *Boston Five Cents*, *Brown*, *Hossein*, and *Casman* were erected to protect the Government from defending the same claim in federal district court which it has already defeated in Claims Court, but not to oblige a claimant to venture blindfolded into a court which may ultimately deny jurisdiction and then preclude a determination on the merits elsewhere. *See, e.g., Boston Five Cents*, 864 F.2d at 140.

Section 1500 is a shield, not a sword for the Government to wield against claimants who litigate in good faith. §1500's purpose is to protect the Government from defending itself against parties who file *and prosecute* duplicative claims. *British American Tobacco Co. v. United States*, 89 Ct. Cl. 438 (1939), *cert. denied*, 310 U.S. 627 (1940). But Keene did no such thing; it was never allowed to litigate its case on the merits against the Government in any forum. Keene bought BEH, its former subsidiary, for $8 million, but now is enmeshed in mass tort litigation of such magnitude that it offers 80 per cent of its net assets to satisfy meritorious asbestos personal injury claims. Keene simply seeks its day in court to adjudicate the Government's responsibility for these injuries; sovereign immunity should not obtain through a judicial reinterpretation of law which Congress has ratified, and which would grant Keene that opportunity.

CONCLUSION

For the reasons set forth herein, and in the prior Petition, Petitioner Keene prays that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

JOHN H. KAZANJIAN
Counsel of Record
IRENE C. WARSHAUER
MARY BETH GORRIE
Counsel for Petitioner
Keene Corporation
ANDERSON KILL OLICK
& OSHINSKY, P.C.
666 Third Avenue
New York, New York 10017
(212) 850-0700